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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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APR 12 2011  
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Finance Docket No. 35459

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**V&S RAILWAY, LLC –  
PETITION FOR DECLARATORY ORDER**

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**RESPONSE OF HUTCHINSON SALT COMPANY, INC., HUTCHINSON  
TRANSPORTATION COMPANY, INC., AND BNSF RAILWAY COMPANY TO V&S  
RAILWAY, LLC'S REBUTTAL**

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Inc., and BNSF Railway Company**

Dated: April 12, 2011

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Pursuant to a Motion for Leave filed simultaneously herewith, Respondents Hutchinson Salt Company, Inc. ("HSC"), Hutchinson Transportation Company, Inc., ("HTC") (collectively, "HSC/HTC"), and BNSF Railway Company ("BNSF") (collectively, "Respondents"), hereby submit this Response to the Rebuttal of V&S Railway, LLC ("Response"). The filing of this Response is necessitated by the assertion of new factual and legal claims by V&S in its Rebuttal. For the first time since V&S' alleged acquisition of Hutchinson and Northern Railway's assets in May 2006, V&S contends that the Operating Rights Agreement ("Agreement"), under which Hutchinson and Northern Railway ("H&N") granted HSC/HTC the right to use certain V&S track west of the Salt Mine Real Estate, was not properly assigned to V&S, and therefore no longer provides HSC/HTC with authority to operate over the V&S track.<sup>1</sup>

As explained further below, the explicit terms of the Agreement, applicable law, and the historical conduct of the relevant parties flatly contradict these claims.

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<sup>1</sup> See V&S Rebuttal at 6.

## **I. Background**

In 1990, HSC/HTC acquired the Hutchinson Salt Mine. Initially, HSC/HTC used H&N's rail switching services to move HSC/HTC's rail cars loaded with rock salt from the Salt Mine to major rail carriers. From the beginning of their relationship, HSC/HTC was dissatisfied with H&N's services. Within a relatively short amount of time, HSC/HTC began to use its own equipment to move cars from the Salt Mine over its property to offer them to major rail carriers for delivery. On or about April 1, 1998, H&N drafted, and the parties executed, an Operating Rights Agreement under which H&N granted "to [HSC/HTC] the right to operate its trains, locomotives, cars, and equipment with [HSC/HTC's] crews over [H&N's] rail line between the Hutchinson Salt Mine facility gate, west on [H&N's] track not to exceed 500 continuous feet." In May 2006, V&S acquired the assets of the H&N. Since the early 1990's, HSC/HTC has used its own trackage on the Salt Mine Real Estate and, from time to time, pursuant to the Operating Rights Agreement, approximately 500 feet of the track V&S acquired from the H&N (the HSC/HTC trackage and the 500 feet of V&S trackage are referred to herein for convenience as the "Subject Trackage"). Due to poor service from V&S, HSC/HTC has not used V&S' services for several years, but has continued to move its cars over the Subject Trackage, and has continued to offer cars to the BNSF for delivery.

In its Petition for Declaratory Order ("Petition"), V&S argued that it possesses an exclusive right to use and operate over the Subject Trackage and that HSC/HTC cannot use any part of the Subject Trackage without V&S' consent. In their Reply, the Respondents presented evidence showing that HSC/HTC's use of the Subject Trackage is purely for private carrier operations, that such use does not interfere with V&S' rights or obligations as a common carrier, and that HSC/HTC owns all of the Subject Trackage and underlying real estate, except for the 500 feet of V&S track which HSC/HTC uses for additional tail room when it is moving its cars

on its own track. (Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc., and BNSF Railway Company's Response to V&S Railway, LLC's, Petition for Declaratory Order 2-3 ("Reply")). V&S has not controverted HSC/HTC's factual evidence, but now claims for the first time in its Rebuttal that the Operating Rights Agreement does not allow HSC/HTC to use the 500 feet of V&S track.

**II. V&S' Claim That The Operating Rights Agreement Prohibits HSC/HTC From Conducting Private Carrier Operations Over the V&S Track Contradicts The Language Of The Operating Rights Agreement And The Historical Conduct Of the Parties**

Article 16 of the Operating Rights Agreement provides that "[t]he Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto, except that any succession or assignment by either party must first have the express written consent of the other party." V&S asserts that the Agreement could not have been assigned from H&N to V&S because no such consent "of the other party" was obtained. However, V&S misinterprets the significance of this provision, which was designed, in these circumstances, to protect HSC/HTC in the event it objected to an assignment by succession from H&N to V&S. HSC/HTC has not exercised its right under Article 16 to object to the assignment, and in fact has ratified the assignment by not objecting and continuing to use the 500 feet of V&S track (from time to time) since 2006. (Liby Second V.S. at 1). Therefore, the Agreement is still in effect and V&S' assertion that HSC/HTC has no contractual right to operate on the 500 feet of V&S track west of the Salt Mine Real Estate is factually and legally flawed.<sup>2</sup>

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<sup>2</sup> V&S itself claims that it is the successor to H&N as a result of its 2006 acquisition of the assets of H&N. Those assets included all of the H&N's rights, leases, franchises, privileges, easements and licenses held by the H&N associated with the H&N's rail line located in Hutchinson, Kansas, pursuant to the explicit terms of the Asset Purchase Agreement and related Assignment. Kansas law will allow HSC/HTC to waive the written consent requirement. *Peoples National Bank and Trust v. Excel Corp.*, 236 Kan. 687, 695 P.2d 444 (1985); *Norris v. McKee*, 102 Kan. 63, 169 P. 201 (1917).

Moreover, V&S asserts in its Rebuttal that it asked HSC/HTC to cease operations on the Subject Trackage. V&S's assertion is misleading. V&S actually only requested that HSC/HTC stop using the trackage on the Salt Mine Real Estate under the V&S's mistaken belief at the time that it owned this trackage, and did not object to HSC/HTC's continued use of the 500 feet of track belonging to V&S described in the Operating Rights Agreement. (See Liby V.S. at 9). (Liby Second V.S. at 2). Although V&S attempts to portray HSC/HTC as "interlopers" (See V&S Petition at 4), V&S has been fully aware of HSC/HTC's operation of its own equipment on the Subject Trackage since before it claimed to acquire the H&N's assets in May 2006. (Liby Second V.S. at 2). Neither party has terminated the Agreement. (Liby Second V.S. at 2).

**III. The Operating Rights Agreement Demonstrates That HSC/HTC Possesses The Required Contractual And Property Rights To Conduct Private Carrier Operations Over The Subject Trackage**

The Operating Rights Agreement is significant for two reasons. First, it shows that since at least 1998, the H&N (and V&S, by succession) recognized that HSC/HTC owned the trackage and property on the Salt Mine Real Estate and had been, and would be operating its equipment on that property. Second, it grants HSC/HTC the authority to use approximately 500 feet of V&S trackage west of the Salt Mine Real Estate property line. The issue of consent underpins the entire V&S argument in its Petition for Declaratory Order. There is no dispute that private carrier operations are permitted on a railroad line with the consent of the common carrier. V&S bases its entire claim in this matter on the assertion that HSC/HTC has no right to use the Subject Trackage for private carrier operations. However, as explained herein, HSC/HTC has the necessary access rights to the V&S track under the Operating Rights Agreement, and as its owner have every right to use their trackage located on the Salt Mine Real Estate. Therefore, the "doomsday" argument made by V&S about every shipper seeking to use its serving railroad's

track for private operations is not relevant here, as shippers typically do not possess both property and access rights to these tracks.

HSC/HTC possesses the necessary property and contractual rights to use the Subject Trackage. V&S has consented to the use of its track under the Operating Rights Agreement (which remains in effect) and surely HSC/HTC possesses the right to utilize the portion of the Subject Trackage owned by HSC/HTC and located on the Salt Mine Real Estate. Therefore, the Board can rule on this case under the existing precedent set forth in *The Boeing Company – Acquisition and Operation Exemption -- Chehalis Western Railway Company*, Finance Docket No. 31916 (ICC served October 10, 1991); *S.D. Warren Company d/b/a Sappi Fine Paper North America – Acquisition and Operation Exemption – Maine Central Railroad Company and Springfield Terminal Railway Company*, Finance Docket No. 34133 (STB served September 30, 2002); and *Brotherhood of Locomotive Engineers v. Interstate Railroad Company, et al.*, Finance Docket No. 31078 (ICC served November 20, 1987). Not only has V&S as the successor to the H&N consented to HSC/HTC's use of the Subject Trackage, there is no interference with any V&S common carrier obligations for the reasons described in our Response.<sup>3</sup>

#### **IV. V&S Misinterpreted The Respondents' Discussion Of The Operating Rights Agreement**

V&S seems to misinterpret the Respondents' explanation of the relevant facts. Contrary to the V&S assertion in its Rebuttal at page 8, there is only one, and not two separate lines of railroad extending between Milepost 0.0 and Milepost 5.14. The uncontroverted facts and the Operating Rights Agreement makes clear that HSC/HTC has been operating its equipment on

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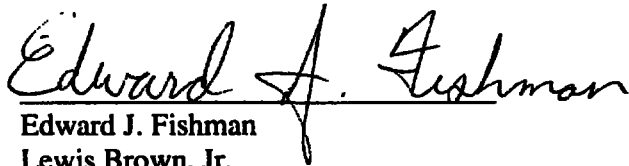
<sup>3</sup> The cases cited by V&S in support of its theory (see Rebuttal at 9-11) are not relevant here because they all involved structured transactions in which the public authority acquiring common carrier right of way and/or trackage was trying to avoid common carrier status and therefore expressly refused to obtain any common carrier or freight operating rights.

trackage located on the Salt Mine Real Estate that is owned by HSC/HTC and that HSC/HTC, from time to time, uses a small portion of V&S track, and at no time has HSC/HTC's use interfered with the V&S's operations.

**V. Conclusion**

V&S' claim that the Operating Rights Agreement does not allow HSC/HTC to conduct private carrier operations over the track owned by V&S is unsupported by the Agreement's terms, the law, and the uncontroverted facts.

Respectfully submitted,

A handwritten signature in cursive script that reads "Edward J. Fishman". The signature is written in dark ink and is positioned above the printed name and address.

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and BNSF Railway Company**

Dated: April 12, 2011

**SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

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**STB Finance Docket No. 35459**

**V&S RAILWAY, L.L.C.  
PETITION FOR DECLARATORY ORDER  
RAILROAD OPERATIONS IN HUTCHINSON, KANSAS**

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**SECOND VERIFIED STATEMENT OF MAX LIBY**

My name is Max Liby. I am the Vice President of Manufacturing of Hutchinson Salt Company, Inc. ("HSC") and a Vice President of Hutchinson Transportation Company, Inc. ("HTC") (hereinafter collectively "HSC/HTC," unless otherwise designated). I make this Second Verified Statement to address new issues raised by V&S Railway, L.L.C. ("V&S").

Attached to my original Verified Statement as Exhibit "1" is the Operating Rights Agreement entered into between HSC/HTC and the H&N dated April 1, 1998 ("Agreement"). I signed this Agreement on HSC/HTC's behalf. The V&S has cited Article 16 of the Agreement, and has claimed it did not obtain HSC/HTC's written permission prior to its assignment. However, the V&S has missed the point of this term. It is HSC/HTC's right to object to the purported assignment which it has not done. HSC/HTC has not objected to the assignment for approximately five (5) years, and HSC/HTC does not object to it now. To the extent that HSC/HTC needs to consent to H&N's assignment of the Agreement to V&S at this point, my Verified Statement should be construed as that consent.

Before now, neither the H&N or the V&S has ever claimed that the Agreement had not been properly assigned, nor that either was not bound by it. I am certain that they have been



aware of the Agreement because it has been exchanged during discovery in the litigation between HSC/HTC and V&S, and I previously testified about the Agreement in the deposition that I gave in the litigation.

HSC/HTC has openly and frequently operated its own equipment on the Salt Mine Real Estate over its rail track since the early 1990s. Once HSC/HTC entered into the Agreement with the H&N, HSC/HTC from time to time openly used the 500 feet of track addressed by the Agreement as well.

Prior to the time that the H&N sold its assets to the V&S purportedly in May of 2006, V&S operated the H&N railroad for the H&N for several months. Since the time V&S began to operate the H&N, HSC/HTC has openly and regularly operated its equipment and moved its rail cars on the Salt Mine Real Estate, and used the 500 feet of track that is the subject of the Agreement. The V&S has undoubtedly been aware of this activity.

The Agreement has never been terminated by the parties, and neither the H&N nor the V&S has ever indicated to HSC/HTC that it could not use the 500 feet of V&S's track that is the subject of the Agreement. The V&S communicated its objection to HSC/HTC using part of the Subject Line in its letter to HSC/HTC dated March of 2007 expressing its claim that it had acquired some of the improvements located on the Salt Mine Real Estate, and demanding that HSC/HTC quit using those improvements located on the Salt Mine Real Estate until HSC/HTC agreed to indemnify the V&S in writing against all damages and losses, and for the parties to negotiate the terms of an Operating Agreement. The V&S's March, 2007, letter was based upon the V&S's mistaken belief that it had acquired some of the trackage and/or other personal property located on the Salt Mine Real Estate as part of its asset acquisition from H&N. The

letter did not, however, claim that the Operating Rights Agreement had not been properly assigned to the V&S, that the Operating Rights Agreement had been, or should be terminated, or that the Operating Rights Agreement was not binding on it in any way. Also, the letter did not object to HSC/HTC's use of the trackage that is the subject of the Agreement.

This concludes my Second Verified Statement.

  
Max Liby

**VERIFICATION**

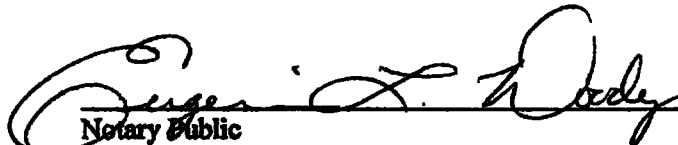
STATE OF KANSAS       )  
                                  ) ss:  
COUNTY OF RENO       )

Max Liby, of lawful age and being first duly sworn, upon oath deposes and states:

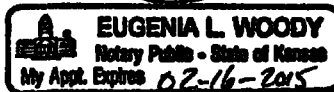
That he has read the foregoing Verified Statement and knows the contents thereof, and that the statements therein contained are true and correct to the best of his knowledge and belief.

  
\_\_\_\_\_  
Max Liby

SUBSCRIBED AND SWORN to before me, a notary public within and for the County and State aforesaid, on this 8<sup>th</sup> day of April, 2011.

  
\_\_\_\_\_  
Notary Public

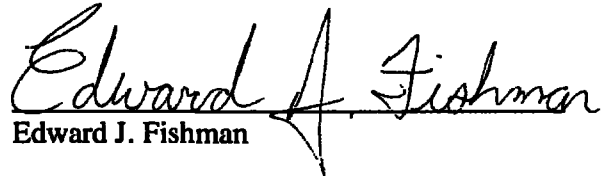
My commission expires:



**CERTIFICATE OF SERVICE**

I hereby certify that I this day served a copy of the foregoing Response of Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc. and BNSF Railway Company to V&S Railway, LLC's Rebuttal upon V&S Railway, LLC by e-mailing a copy to its counsel Fritz R. Kahn, Esq., at xicgc@verizon.net, and upon the Association of Railway Museums, Inc., and the Tourist Railroad Association, Inc., by e-mailing a copy to their counsel, Robert T. Opal, Esq., at RobertTOpal@aol.com.

Dated at Washington, DC, this 12th day of April, 2011

  
Edward J. Fishman